

EXHIBIT E

Excerpts from the transcript for the deposition of Daniel Gevais

In The Case Of

*Carrie Couser, Individually and on Behalf of All Others
Similarly Situated,*

v.

Comenity Bank

3:12-cv-02484-MMA-BGS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

CARRIE COUSER, INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS SIMILARLY
SITUATED,

Plaintiffs, Case No. 3:12-CV-02484

vs.

MMA-BGS

COMENITY BANK,

Defendant.

Deposition of
DANIEL GERVAIS
January 21, 2014

11:05 a.m.

41 South High Street, Suite 210
Columbus, Ohio

Reported by:

Kimberly A. Kaz, RPR, Notary Public

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1 dialer with those fields or with those numbers
2 to be called by the dialer?

3 A. The campaign managers do not make
4 that decision.

5 Q. Who makes that decision? 11:21:32

6 A. My manager does in conjunction with
7 me and our collections leadership.

8 Q. Okay. Now, are those lists or the
9 campaigns that are dialed, are those recorded
10 for -- so that, like, in three months, you want 11:21:50
11 to know what campaign you ran and which
12 telephone numbers were called in three months,
13 is there a record of that?

14 A. Yes.

15 Q. And how far back do you have these 11:21:59
16 records?

17 A. September 2012.

18 Q. Why is that such a significant
19 date, September? Why not before?

20 A. That was when we established our 11:22:09
21 dialer tables to house that information.

22 Q. So do you not have any data
23 pre-September 2012?

24 A. No, sir.

25 Q. Zero data? 11:22:21

1 A. No, sir.

2 Q. Have you looked for any data?

3 A. Yes.

4 Q. And the outcome was negative?

5 A. Correct. 11:22:28

6 Q. Did you use a different dialing
7 system before September 2012?

8 A. Yes, sir.

9 Q. And what happened to those dialers
10 that you were using pre-September 2012? 11:22:37

11 A. I do not know where those dialers
12 are.

13 Q. Who would know?

14 A. Todd Prince might know.

15 Q. Can you spell his name, please? 11:22:49

16 A. First name Todd, T-o-d-d.

17 Q. Yeah.

18 A. Last name Prince, P-, as in "Paul,"
19 -r-i-n-c-e.

20 Q. Okay. And what is his title, 11:23:00
21 Mr. Prince's title?

22 A. I do not know.

23 Q. Okay. Is he still at the entity?

24 A. Yes, sir.

25 Q. And is he at the same corporate 11:23:08

1 we're talking about again.

2 So the predominant members of the
3 class are accountholders who have defaulted at
4 some point, correct?

5 A. Yes. 11:40:05

6 Q. Now, actually, in the application
7 process, are accountholders asked to put down
8 third-party contact names? For example, you
9 know, if you're opening up an account,
10 sometimes you're asked to write down, like, 11:40:23
11 give me a secondary contact, like, if somebody
12 gives their brother's name with a telephone
13 number. Does that happen?

14 MR. KAMINSKI: Okay. Calls for
15 speculation. Lacks foundation. 11:40:31

16 THE WITNESS: Yes, sir.

17 Q. And are some of these people that
18 were called third parties within our class,
19 within the Couser class?

20 A. Yes. 11:40:45

21 Q. Like references as well, maybe?

22 MR. KAMINSKI: Objection. Calls
23 for speculation.

24 THE WITNESS: That could be that,
25 yes. 11:41:03

1 Q. Cosigners?

2 A. Yes, sir.

3 Q. So there are people in the class

4 that -- whose addresses we may not have on

5 accounts at Comenity; is that correct?

11:41:17

6 A. Yes, sir, in the case of cosigners.

7 Q. Or third-party contacts?

8 A. Right.

9 Q. Now, what percentage, to the best

10 of your estimation, of the class do we have

11:41:34

11 addresses for and which ones don't we have

12 addresses for? Like, if you had to estimate

13 the percentage.

14 A. I'd have to guess.

15 Q. I don't want you to guess.

11:41:45

16 A. So I don't know.

17 Q. Is it more than 50 percent we have

18 addresses for? Do you know that much?

19 A. Yes, sir.

20 Q. More than 70 percent?

11:41:52

21 A. Yes.

22 Q. More than 80 percent?

23 A. Yes.

24 Q. More than 90?

25 A. Yes.

11:41:58

1 Q. More than 95?

2 A. Yes.

3 Q. Is that where it starts getting a
4 little bit unsure?

5 A. Yes. 11:42:04

6 Q. But it's definitely more than 90?

7 A. Yes.

8 Q. Okay. Now, do all accountholders
9 have arbitration clauses in their contacts,
10 credit card contracts? 11:42:17

11 MR. KAMINSKI: Objection. Calls
12 for speculation.

13 THE WITNESS: I do not know.

14 Q. You don't know?

15 MR. KAZEROUNIAN: Can I have a 11:42:29
16 quick second?

17 MR. KAMINSKI: Sure.

18 (Recess taken.)

19 Q. Mr. Gervais, your customers at
20 Comenity, do you usually get consent to call 11:46:09
21 them with an auto dialer?

22 A. Yes.

23 Q. And how many different ways, to the
24 best of your knowledge, do you get consent to
25 call your clients on an auto dialer? 11:46:23

1 MR. KAMINSKI: Objection with
2 respect to the phrase "auto dialer." Vague and
3 ambiguous. Lacks foundation.

4 THE WITNESS: Do you want to know
5 the number of ways or the different ways? 11:46:35

6 Q. I'm asking the same thing. Give me
7 a list, and we'll go through them.

8 A. So we can get them from
9 applications.

10 Q. Okay. 11:46:45

11 A. Which can be online, in the store,
12 et cetera.

13 Q. Well, let's not do et cetera. I
14 want as many as possible.

15 A. Okay. 11:46:53

16 Q. You tell me all the different
17 application forms you know. So we got online,
18 in store.

19 A. Online, in store, mailed.

20 Q. Okay. 11:47:03

21 A. That's the only application sources
22 I know of.

23 Q. Okay. Fax?

24 A. I'm not aware of fax.

25 Q. E-mail? 11:47:17

1 A. Not aware of e-mail applications.

2 Q. Okay. Carry on.

3 A. The customer can give us their
4 phone number through our website.

5 Q. Okay. 11:47:26

6 A. They can call in to us, to our
7 customer service department.

8 Q. So orally?

9 A. Yes.

10 Q. By phone? 11:47:39

11 A. Yes.

12 Q. Okay.

13 A. So the different versions of orally
14 are they call us, or if we call them through
15 a -- and talk to them for collections and they 11:47:52
16 give us other phone numbers that we can call
17 them on.

18 Q. Do you have a policy where the
19 first call is made by a landline, let's say?

20 A. No. 11:48:04

21 Q. So if it goes to collections, it
22 just gets loaded up into the dialer?

23 MR. KAMINSKI: Objection. Vague
24 and ambiguous.

25 THE WITNESS: Only numbers that we 11:48:11

1 have consent to call through the dialer do we
2 load into the dialer.

3 Q. Now, in the contract or in the
4 application, does it say, "By you giving us
5 this telephone number, you're giving us consent 11:48:21
6 to call you with an auto dialer?" Does it have
7 language to that effect?

8 A. I'm informed it does.

9 Q. Who informed you of that?

10 A. Our company attorneys. 11:48:32

11 Q. Don't ever tell me about what your
12 attorneys tell you. I don't want to know about
13 that.

14 A. Okay.

15 Q. Have you ever actually seen the 11:48:38
16 contract yourself?

17 A. Yes, I have.

18 Q. And you've seen that language?

19 A. I've seen that language.

20 Q. Okay. And that's a standard 11:48:58
21 language?

22 A. Yes.

23 Q. Okay. So in that same contract,
24 you don't remember if there's an arbitration
25 clause in there? 11:49:05

1 A. I'm informed there are --

2 Q. Okay.

3 A. -- arbitration clauses. I don't

4 recall.

5 Q. Okay. So if it is in there, 11:49:14

6 the -- that would be standard for all the

7 customers, right?

8 A. Yes, sir. That's what I'm

9 informed.

10 Q. Okay. So let's go through the 11:49:23

11 answer. Online, so somebody can just go online

12 to get a line of credit with Comenity, and they

13 can give that telephone number online?

14 A. Yes.

15 Q. They could be at the Gap store or 11:49:35

16 Old Navy, and they're doing it right there, and

17 they write in their telephone number in the

18 application and then mail it in, right?

19 A. Yes.

20 Q. Or you could obviously do it by 11:49:46

21 mail where you send it to them and same

22 variation thereof, I guess?

23 A. Yes.

24 Q. Or they can go to your website and

25 give consent that way? 11:49:56

1 A. Yes.

2 Q. And you can obviously, like, if
3 they call in, you could ask -- you sometimes
4 ask orally whether you can use a dialer, right?

5 A. Yes. 11:50:06

6 Q. And also, on top of that, you have
7 language in your contract?

8 A. Yes.

9 Q. Okay. And you believe there's an
10 arbitration clause as well? 11:50:11

11 A. I'm informed, yes.

12 Q. Okay. But you've actually seen the
13 language regarding dialer, but you haven't seen
14 the language regarding the arbitration?

15 A. Yes, sir. 11:50:23

16 Q. Okay. But, obviously, the third
17 parties -- you know, we're talking about
18 references or, like, a secondary number or
19 something, it's usually the applicant that puts
20 that number down, not the third party 11:50:37
21 themselves, correct?

22 A. Correct.

23 Q. And just to firm this up, we have
24 no data from September 2012 going back,
25 correct? 11:50:58

1 A. Correct.

2 Q. It's good news that I'm slowing
3 down. It means we're almost there.

4 So as you sit here today, you
5 actually are not in possession of an outbound 11:51:30
6 dial list? The third party has it, right, an
7 outbound dial list of all the cell phones that
8 were called from September 2012 to the present
9 date?

10 MR. KAMINSKI: Do you understand 11:51:43
11 the question? He's asking if you have
12 possession.

13 THE WITNESS: I do not have
14 possession of that list.

15 Q. And to the best of your belief, is 11:51:50
16 that in the possession of a third-party expert?

17 A. Yes, sir.

18 MR. KAZEROUNIAN: Now,
19 Mr. Kaminski, while we're on the record, can we
20 agree that and for the purposes of preliminary 11:52:01
21 approval papers, you'll supply me with some
22 kind of declaration from the third party
23 regarding the exact number of calls that were
24 scrubbed?

25 MR. KAMINSKI: I will take this 11:52:10

1 issue up under advisement and speak with my
2 client.

3 MR. KAZEROUNIAN: Okay. So we'll
4 meet and confer maybe within --

5 MR. KAMINSKI: We'll meet and 11:52:17
6 confer further.

7 MR. KAZEROUNIAN: Okay.

8 Q. And the only database that you
9 searched in order to provide data to whoever
10 the data was provided to was the dialer 11:52:37
11 records, right?

12 A. Yes, sir.

13 Q. Did you have to -- when you were
14 going through the dialer records, did you have
15 to do any further search criteria in order to 11:52:57
16 get the data that you needed, or did you get
17 just the raw data from September 2012 to the
18 present day and just handed it over?

19 A. I just got the raw data from the
20 phone numbers called from September '12 forward 11:53:08
21 and handed it over.

22 Q. Is there anything else that you
23 looked at or mined in order to give to the --

24 A. The only other criteria was what we
25 talked about before, I excluded wrong numbers 11:53:27

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COMENITY BANK,

3:12-CV-02484-MMA-BGS

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VOLUME II

Continued Deposition of DANIEL GERVAIS,
taken at 41 South High Street, Columbus,
Ohio, commencing at 10:04 a.m., Thursday,
August 21, 2014, before Rebecca Williams,
RPR, Notary Public.

JOB No. 1885285

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1 million."

2 A. That is correct.

3 Q. Okay. So -- I mean, you're

4 entitled to change your mind. You're only

5 100,000 out of 4.4 million. Is that your final 10:14:12

6 answer? Would you like to call a friend? No.

7 I just want to be -- I don't want to be cute.

8 I just really -- for the sake of the regard, we

9 need to have as specific number as possible.

10 So is it 4.4? 10:14:26

11 MR. KAMINSKI: Can we go off the

12 record a moment?

13 MR. KAZEROUNIAN: Yeah, of course.

14 (Discussion held off record.)

15 Q. Okay. So, Mr. Gervais, would it be 10:16:20

16 fair to say that the actual number is between

17 4.3 and 4.4 million?

18 A. Yes --

19 Q. And that's -- I apologize for

20 cutting you off. That's why we have a 10:16:37

21 discrepancy?

22 A. Yes.

23 Q. And how did you come up with --

24 well, actually strike that.

25 The -- one of the main reasons 10:16:46

1 we're having a deposition today is because in
2 January, you mentioned to me that you have zero
3 data for anything that is prior to September of
4 2012; is that correct?

5 A. Can I have a minute? 10:17:02

6 Q. Of course. Let's go off the
7 record.

8 (Discussion held off record.)

9 Q. So, yeah, when we talked in
10 September -- I'm sorry, in January of this year 10:17:43
11 -- and you mentioned that there's no data prior
12 to September of 2012, but, subsequently, Mr. --
13 you know, your company and my clients have
14 negotiated a settlement that goes prior to
15 September 2012. 10:17:58

16 So I guess my question to you is
17 where are you -- are you -- where are you
18 getting your data from, as it pertains to
19 August of 2010 to September of 2012?

20 A. Our collection activity tables. 10:18:10

21 Q. Okay. So can you expand on that
22 and explain to me how you're getting the data?

23 A. We're querying those tables -- the
24 collection activity table resides in EWD, and
25 we query those to get number of phone calls 10:18:27

1 made.

2 Q. Okay. So you have your collection
3 software, which is ESW or something -- what's
4 your software called?

5 A. It's proprietary. It's called 10:18:41
6 Collection Web.

7 Q. Okay. So you have Collection Web,
8 and then you can run a search that shows who
9 was then delinquent during that period?

10 A. Yes. 10:18:53

11 Q. Okay. So using that proxy, you can
12 see who was called, correct?

13 A. Yes.

14 Q. So you first have -- you first have
15 to run a search to see who is delinquent; is 10:19:02
16 that right?

17 A. No.

18 Q. Okay. So explain the system to me.

19 A. I run a query for all the calls
20 coded on the collection activity table. 10:19:13

21 Q. And how do you know which calls
22 were in the dialer and which ones were not?

23 A. Not one hundred percent sure which
24 ones were dialer and which ones were not.

25 Q. So how did you come up with a cost 10:19:26

1 number? What system did you use? What
2 process?

3 A. We collect -- we query the
4 Collection Web table to get phone calls made.

5 Q. Okay. 10:19:37

6 A. We then send those -- that list of
7 phone calls made to an outside consultant to
8 get the phone calls made to mobile phones.

9 Q. Okay. So they probably used
10 NEWSTAR or something like that, but the 10:19:52
11 universe that you started with was just anyone
12 that you coded, that they got a call?

13 A. Yes, sir.

14 Q. But were these only with delinquent
15 accounts? 10:20:05

16 A. Yes.

17 Q. Okay. Now -- because where I was
18 going with that line of questioning is how do
19 you know most of those people got called by a
20 dialer but by the mere fact that they were put 10:20:12
21 in a dialer -- and I don't want to put words in
22 your mouth -- going back to your January
23 testimony, you said that anyone that was
24 delinquent would have been put in the dialer as
25 a process? 10:20:22

1 A. Yes.

2 Q. So would it be fair to say that
3 more than fifty percent of those people would
4 have definitely been put in the dialer?

5 A. Yes.

10:20:30

6 Q. More than sixty percent?

7 A. Yes.

8 Q. More than seventy percent?

9 A. Yes.

10 Q. More than eighty percent?

10:20:35

11 A. Yes.

12 Q. More than ninety percent?

13 A. Yes.

14 Q. More than ninety-five percent?

15 A. Yes.

10:20:41

16 Q. Okay. Perfect.

17 And that is based upon the -- the
18 policy and the procedures in place at Comenity
19 and when the dialer is used with delinquent
20 accounts on the telephone numbers, correct?

10:20:55

21 A. Correct.

22 Q. And --

23 MR. KAMINSKI: And let's just
24 clarify that you're talking about the period
25 August 1st '10 through August 31st, 2012.

10:21:02

1 Q. Okay. Now, there's only one more
2 piece to that puzzle that I need to come full
3 loop on, which is how do you know who was in
4 the Picchi class, which is the -- the wrong
5 call account and who was not? 10:22:13

6 A. During that process you just
7 described, we excluded any call that was
8 terminated as a wrong number.

9 Q. Right. Now, I remember in January,
10 you said that the Picchi class, which is the 10:22:27
11 Florida class action on the wrong party calls,
12 were premised on coded -- on wrong party calls,
13 correct?

14 A. Correct.

15 Q. Is that coding in your software? 10:22:42
16 Is it proprietary software, or is it only on
17 the dialer?

18 A. It's in both.

19 Q. Okay. So, therefore, you did have
20 data for the coding -- going back before 10:22:49
21 September 2012 on the wrong party coding?

22 A. Yes.

23 Q. Okay. So you scrubbed that
24 in-house?

25 A. Yes. 10:22:59

1 Q. And your software is capable of
2 doing that?

3 A. Yes, sir.

4 Q. Okay. And that scrubbing process
5 is probably over ninety-nine percent accurate? 10:23:08

6 A. Yes.

7 Q. Okay.

8 MR. KAMINSKI: Late objection.
9 Calls for speculation, but I'll let the witness
10 testify and let his answer stand. 10:23:17

11 Q. So in compiling the data for the
12 August 1st, 2010 to August 31st, 2012, are you
13 confident that we have all the calls that were
14 made to cell phones that would fit within this
15 class definition? Is there anything else that 10:23:38
16 we could have possibly missed?

17 A. Yes, I'm confident.

18 Q. Okay. So in coming up with the
19 total universe of numbers for the class
20 definition from August of 2010 to end of May 10:23:51
21 2014, you actually have to add up two separate
22 sets of numbers, correct, because you have to
23 do two type of searches, am I right?

24 A. Correct.

25 Q. Okay. We went over the way that 10:24:03

1 you came up with the numbers for -- 2012 to
2 2014 in January, and we'll go over that just so
3 we come full loop, but do you know
4 approximately how many people are in the August
5 2010 until August 31st, 2012 group? 10:24:20

6 A. Yes, approximately 2.3 million.

7 Q. Perfect. Okay. So let's go to the
8 September 2012 to May of 2014. How did you
9 come up with the number of people in the class
10 in that period? 10:24:42

11 MR. KAMINSKI: And just for
12 clarity's sake, we're talking about September
13 1st, 2012 through May 26, 2014, correct?

14 MR. KAZEROUNIAN: Yes, sir.

15 A. I queried the dialer tables. 10:24:53

16 Q. You queried the dialer tables?

17 A. Yes.

18 Q. And is there some kind of dialer
19 list?

20 A. Yes. 10:25:02

21 Q. And how did you query it?

22 A. Using a tool called WinSQL.

23 Q. Okay. And what did you do in
24 running a query?

25 A. I queried for all calls made via 10:25:16

1 dialing equipment between September of 2012 and
2 May 26th, 2014.

3 Q. So you started with the entire
4 universe?

5 A. Yes, sir. 10:25:28

6 Q. Okay. So then what did you do?

7 A. I excluded the wrong number of
8 calls.

9 Q. Because they were coded?

10 A. Yes, sir. 10:25:34

11 Q. And the coding for the wrong party
12 calls on the dialer had been put into effect
13 from when you started compiling the tables,
14 correct?

15 A. Yes. 10:25:43

16 Q. Which was in September of 2012?

17 A. Yes, sir.

18 Q. Okay. Continue.

19 A. Once we had that list, we sent it
20 to outside experts, NEWSTAR. 10:25:51

21 Q. Right.

22 A. They scrubbed it for the phone
23 numbers that were mobile phones.

24 Q. Okay. And the scrubbing that you
25 did for the wrong party calls, you did that 10:26:05

1 in-house again, correct?

2 A. Yes.

3 Q. Did you do that yourself?

4 A. Yes.

5 Q. And are you confident that that 10:26:10
6 process was over ninety-nine percent accurate?

7 A. Yes, sir.

8 Q. Okay. So after NEWSTAR sends it
9 back, they send all the cell phone numbers,
10 right? 10:26:21

11 A. Yes, sir.

12 Q. So in that period of time, the
13 September of 2012 through May 26 of 2014, how
14 many people in that -- in that group?

15 A. A little more than 2 million. 10:26:31

16 Q. Okay. So then you add that group
17 with the group that we previously talked about,
18 which is August 2010 to August 31, 2012, which
19 was 2.3, and then just over two, which gives us
20 the entire class, which is 4.3 -- just over 4.3 10:26:49
21 as you had mentioned previously, right?

22 A. Yes, sir.

23 Q. And that is our world?

24 A. Yes.

25 Q. Our class? 10:27:01

1 A. Yes.

2 Q. Excellent. And are you confident
3 that those two groups put together that make up
4 our class are really the class and we haven't
5 left out any numbers outside of that? Any 10:27:14
6 class members outside of that to a high degree
7 of confidence?

8 MR. KAMINSKI: Excluding the wrong
9 number of calls from the Picchi class?

10 MR. KAZEROUNIAN: Yes. I'm talking 10:27:25
11 about are we confident that we've got anyone
12 that fits within our class definition, which
13 excludes Picchi, which excludes landline calls,
14 you know, and any -- I just want to make sure
15 that we haven't left out any people that would 10:27:37
16 fit into our class on the periphery.

17 A. Yes, I am confident.

18 Q. Excellent.

19 Now, these people that make up our
20 class, the 4.3 -- give or take -- million, 10:27:54
21 these include accountholders, and, you know,
22 references and people like that, right?

23 A. Yes, sir.

24 Q. Okay. And where we got -- where we
25 got the data from, which is the -- you know, 10:28:17